

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT BECKLEY

TERRY LEE ROSEBORO,

Petitioner,

v.

CIVIL ACTION NO. 5:04-0389

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION

Pursuant to the court's order of March 31, 2005, in which the court partially confirmed and accepted Magistrate Judge R. Clarke VanDervort's Proposed Findings and Recommendation ["Findings and Recommendation" or "F & R"], referred this matter back to the magistrate judge for further proceedings, and indicated that an explanatory memorandum opinion would follow forthwith, the court now issues its memorandum opinion.

I. Petitioner's Objections

Petitioner raises several objections to the magistrate judge's Findings and Recommendation, in which the magistrate judge recommended that this court consider petitioner's application under 28 U.S.C. § 2255, rather than under § 2241, and conclude that the district court has no jurisdiction to consider the issues presented by the application, that this court deny petitioner's application to proceed *in forma pauperis*, and that the court dismiss petitioner's application. Because petitioner has since filed motions in relation to the United States Supreme Court's decisions in Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, 125

S. Ct. 738 (2005), the court defers ruling on petitioner's objections with regard to the magistrate judge's recommendation that the application in this matter be considered under § 2255 and, accordingly, dismissed.\* Because none of petitioner's objections relate to the magistrate judge's recommendation that the application to proceed *in forma pauperis* be denied, the court hereby DENIES the same.

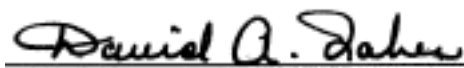
## **II. Conclusion**

As previously stated in the court's order of March 31, 2005, the court (1) CONFIRMS and ACCEPTS the magistrate judge's findings to the extent stated above, (2) DENIES petitioner's application to proceed *in forma pauperis* (Doc. No. 2), (3) DENIES petitioner's motion to amend his objections in light of Blakely (Doc. No. 7), as his subsequent motions filed pursuant to Booker preserve the issues on which the motion to amend sought review, and (4) refers this matter back to the magistrate judge for further proceedings with regard to petitioner's recently filed motions relating to Booker.

The Clerk is directed to forward a copy of this written opinion and order to the petitioner, pro se, and to all counsel of record.

IT IS SO ORDERED this 28th day of April, 2005.

ENTER:



David A. Faber  
Chief Judge

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To the extent the court's order of March 31, 2005, indicated that petitioner's objections to the Findings and Recommendation were overruled, the order did not refer to petitioner's objections to the recommendation that the application be construed pursuant to § 2255 and dismissed. As stated above, the court defers ruling on petitioner's objections in this regard pending the magistrate judge's consideration of petitioner's recently filed motions with regard to Booker.